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Scope of Statutory Appeal and Access to Justice

Greenpeace Ltd, Petitioners

[2020] CSOH 88

The scope of a statutory appeal procedure was given a broad interpretation to ensure that important aspects of the decision to give consent to an offshore oil-field development could be subject to effective legal challenge. In view of the existence of this alternative means of challenge, it was, however, not appropriate to allow the challenge here to proceed under the standard judicial review procedure.

Background

Before drilling for oil can begin, consent from the Oil and Gas Authority must be obtained, with the agreement of the Secretary of State. As part of the procedure, the Secretary of State must carry out an environmental impact assessment. The Oil and Gas Authority has a limited remit in deciding whether to give consent so that environmental issues are considered only by the Secretary of State in deciding whether or not to agree to consent being granted.

In earlier proceedings in England, it had been accepted by the Secretary of State that the relevant regulations, the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 SI 1999/360, failed to implement fully the EU Directive on such assessments. Consultation was under way on the introduction of amendments to ensure that the Regulations would comply.

The issue here was whether leave should be granted for judicial review seeking a declarator that the Regulations did not properly implement the Directive and the quashing of the Secretary of State's agreement to consent being granted for drilling in the Vorlich Field in the North Sea.

Arguments and decision

Judicial review is only possible where there is no satisfactory alternative procedure available to contest the decision in question. In the first place it was argued that since the provisions creating a specific procedure for challenging a grant of consent referred only to non-compliance with the Regulations, there was no scope for using that procedure to raise issues relating to compliance with the Directive's requirements. Lord Boyd dismissed this argument. Insofar as the Regulations failed to implement the Directive, the Directive had direct effect and could be relied on.

Secondly it was argued that since the legislation providing for a statutory challenge referred only to the consent, that statutory procedure could not be used to raise issues relating to the Secretary of State's consideration whether or not to agree to the grant of consent. Again, this argument was dismissed. The agreement and consent should be seen as one integrated process, not two distinct procedures.

This conclusion was strengthened by the fact that if it was only the consent that could be challenged under the Regulations, the route for challenging the Secretary of State's decision (the only stage at which environmental issues are considered) would be limited to judicial review. Yet the standard three-month time-limit for raising a judicial review might well have expired before the Authority reached its final decision on consent. The absence of an effective means of challenge, Lord Boyd

said, would be a serious *lacuna* and probably a breach of the obligations in relation to access to justice under the Aarhus Convention.

Outcome and Comment

Leave to proceed with the judicial review was refused since there was an alternative statutory procedure available. The practical outcome of this case, however, is rather messy since a parallel statutory challenge was in fact already under way. Moreover, it was held that the main substantive issues were moot given that it had been accepted that the Regulations did not comply with EU law and steps were already being taken to correct that position. Argument over whether or not the proposed amendments went far enough were said to be for the political arena, not the courts.

Of wider interest, perhaps, are Lord Boyd's comments on access to justice and seeking to ensure that there is a meaningful way to challenge important decisions. In past years, one might have expected a narrow, legalistic interpretation of such statutory provisions. That the court was prepared to consider the broader picture, shows an increased regard for access to justice and the importance of the rule of law (although the result here was to deny judicial review). Indeed the reference to the Aarhus Convention and the indication of certain issues as belonging within political processes further the impression of a welcome willingness to have regard to governance arrangements in the broader context.

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